Supreme Court, U.S.
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No. 87-1022

Supreme Court of the United States
OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York, FRANK V. PONTERIO and ROBERT A. STRANIERE,

Appellants,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT FRANK V. PONTERIO OPPOSING APPELLEES' MOTION TO AFFIRM

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STATEMENT OF THE CASE

Appellant FRANK V. PONTERIO submits this reply brief in opposition to appellees' motion to affirm the judgment of the United States Court of Appeals for the Second Circuit. A comprehensive statement of this case is presented in appellant Ponterio's jurisdictional statement and is not repeated here.

ARGUMENT

Appellees' brief in support of their motion is most significant for its failure to raise a single argument against appellant Ponterio's district voting power analysis, and for its misstatement of facts on other matters. Appellees cannot, of course, argue against the district voting power methodology or its underlying assumptions since it was they who first proposed that this method be used to reconfigure the Board's voting structure.

Appellees focus their methodology arguments on support for the *Abate* method, *Abate v. Mundt,* 403 U.S. 482 (1971), and on criticism of the citizen voting power method (the Banzhaf power index). Appellant Ponterio's arguments on these methods have already been presented to this Court in his jurisdictional statement. Nevertheless, certain misstatements in appellees' brief warrant a reply. Appellees assert that the *Abate* method is "universally recognized and accepted" (br. at p. 6). This is obviously untrue in light of *Franklin v. Krause,* 32 N.Y.2d 234 (1973), *appeal dismissed 415 U.S. 904 (1974), and League of Woman Voters v. Board of Supervisors of Nassau County,* 737 F.2d 155 (2d Cir. 1984), both of which recognized and accepted the district voting power method and, in so doing, rejected the *Abate* method. It is also untrue in light of the floterial district cases cited in appellant Ponterio's jurisdictional statement.* In those cases the courts found no impediment to aggregating at-large and local members in the apportionment computations.

Appellees distort the truth by claiming that application of the Banzhaf power index to the Board of Estimate

*See e.g., *Mahan v. Howell,* 410 U.S. 315 (1972), *Andrews v. Koch,* 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews,* 459 U.S. 801 (1982).

by the municipal defendants involved an ad hoc adaptation and that this method had not previously been proffered by anyone, including Banzhaf (br. at p. 25). The truth is that the Banzhaf index needs no adaptation for application to the Board and it was for this very reason that Banzhaf recommended its use in this case. This recommendation was first made in a private conversation with appellant Ponterio who then submitted the appropriate analysis to the District Court (the District Court denied Banzhaf's application to appear as amicus curiae and present the analysis himself). The method was again offered by Banzhaf in his amicus brief on appeal. (The Second Circuit granted his application to appear as amicus curiae).

Appellees also misstate the history of the Board by claiming that the Board scheme has never been reapportioned (br. at p. 34). Appellees are certainly aware that Board votes were reapportioned in 1958 in response to the population growth in the boroughs of the Bronx, Queens and Staten Island. At that time, those boroughs' votes were doubled, making their votes equal to those of the boroughs of Manhattan and Brooklyn. Indeed, this bit of history is excerpted from appellees' own affidavit in support of their motion for summary judgment in the first District Court proceeding. History aside, appellees' description of the Board scheme as "petrified" is pointless. No court has required reapportionment to occur automatically or to occur with any particular frequency. Clearly, Board apportionment, if required, can be accomplished by Charter revision as appellees themselves point out in their brief.

In a rather frail attempt to counter appellant Ponterio's argument that summary judgment was inappropriate, appellees point to a February 13, 1985 stipulation (br. at p. 3, fn.). This stipulation dealt solely with an enumeration of agreed and disputed policies and interests that might justify Board malapportionment as found by the District Court (Appendix on appeal to the Court of Appeals, pp. 706-709). This stipulation did not relate at all to contested methodology issues nor did it cure the District Court's failure to resolve such issues by a hearing or trial. Obviously it is not relevant to appellant Ponterio's argument that 2½ years thereafter the Second Circuit relied upon its own court-invented "facts" to affirm the methodology decision. The only agreed-upon facts in this case that are relevant to methodology issues are the borough populations given by the 1980 census, and the composition and voting rules of the Board.

Finally, grasping at straws, appellees argue that this Court should not grant plenary review because this case will be made moot by a revision of the City charter. Appellees' reasoning is backwards. Charter revision is being reluctantly investigated by the City and only because it is currently required to do so by the lower court's decision. If this Court should reverse the lower court's decision, no charter revision will be required. Appellees claim that the lower courts have ruled on behalf of the citizens of the City (br. at p. 38). Appellees are mistaken. The lower courts have thwarted the will of the citizens of the City who, over the past 90 years, have repeatedly voted to keep the Board of Estimate as it is.

CONCLUSION

Appellees have fallen far short of making a case that no substantial federal question has been raised by appellants. Their motion should be denied.

Dated: Staten Island, New York
February 10, 1988

Respectfully submitted,

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